No. 87-1293

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

ANDREW SOKOLOW

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM AND REPLY MEMORANDUM FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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I

Before addressing the arguments made in respondent's opposition, we wish to point out a development in this case that we learned about only after the petition had been filed.

As we explained in the petition (at 2 & n.1), the court of appeals denied our rehearing petition on November 4, 1987. It did not, however, act on our suggestion for rehearing en banc at that time. On the same date, however, the court of appeals issued a new opinion that substantially changed the rationale for the court's decision. Accordingly, on November 18, 1987, we filed a supplemental rehearing petition and suggestion for rehearing en banc. At the same time, because, under Rule 20.4 of the Rules of this Court, the time within which to file a petition for a writ of certiorari runs from the date of the denial of a rehearing petition, we sought an extension of time from this Court

within which to file a petition for a writ of certiorari. On December 30, 1987, Justice O'Connor entered an order extending the time within which to file a petition for a writ of certiorari until February 2, 1988. Because our petition for rehearing had been denied 90 days earlier, we were compelled to file our certiorari petition on that date, even though the court of appeals had not yet acted on our suggestion for rehearing en banc.

We later learned that on December 30, 1987, the court of appeals entered an order in which it directed the clerk to file the supplemental petition for rehearing and suggestion for rehearing en banc and in which the court treated that pleading as a new petition for rehearing. App., *infra*, 1a. Unfortunately, the court of appeals did not serve counsel of record for the United States with a copy of the court of appeals' December 30 order. We were therefore unaware of that order until we were informed about it by the Clerk of the Ninth Circuit on March 3, 1988. As of the date of the filing of this memorandum, the court of appeals still has not acted on our supplemental rehearing petition or on our suggestion for rehearing en banc.

The court of appeals' December 30 order raises the question whether the certiorari petition in this case is ripe for consideration by this Court.[1] Rule 20.4 of the Rules of this Court provides that the time within which to file a certiorari petition commences when a rehearing petition is denied, which occurred in this case on November 4, 1987. By ordering that the government's supplemental rehearing

[1] The ripeness question is prudential, not jurisdictional. This Court may grant a petition for a writ of certiorari in any case that is in a court of appeals, even if the court of appeals' judgment is not final. See, *e.g.*, *Barefoot* v. *Estelle*, cert. granted, 459 U.S. 1169 (treating an application for a stay as a petition for a writ of certiorari before judgment and granting the petition), 463 U.S. 880, 887 (1983).

petition be treated as a new petition for rehearing, however, the court of appeals' December 30, 1987, order may have had the effect of suspending the finality of that court's November 4, 1987, order—assuming, of course, that the government's supplemental rehearing petition will hereafter be considered on its merits. Compare *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952), with *Bowman* v. *Loperena*, 311 U.S. 262 (1940); see R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* § 6.3, at 312-313 (6th ed. 1986).

We believe that the best way to resolve this matter is for the Court to hold the petition in this case until the court of appeals has finally acted on the government's supplemental rehearing petition. If the court of appeals grants that petition or decides to rehear the case en banc, review by this Court may be unnecessary, at least at present. On the other hand, if the court of appeals denies the government's supplemental rehearing petition, the certiorari petition in this case will clearly be ripe for review. Holding the certiorari petition until the court of appeals finally acts on our supplemental rehearing petition will not prejudice respondent, because he is free on bail. We will, of course, inform the Court of any future action by the court of appeals on the government's supplemental rehearing petition and suggestion for rehearing en banc.

II

In our petition, we argued that review is warranted because the novel two-part test adopted by the court of appeals for assessing reasonable suspicion in the airport setting is contrary to (1) this Court's decision in *Florida* v. *Royer*, 460 U.S. 491 (1983); (2) the approach followed by other courts of appeals in analyzing airport stop cases; and (3) the Fourth Amendment principles this Court has con-

sistently endorsed since *Terry* v. *Ohio*, 392 U.S. 1 (1968), in the context of reasonable suspicion stops. Respondent does not deny that the court below adopted a two-part test for assessing *Terry* stops of suspected narcotics traffickers in the airport context, nor does he deny that the factors on which the agents relied on this case are ones on which other courts of appeals commonly rely in upholding *Terry* stops of suspected narcotics traffickers in that setting (Pet. 11-14). Instead, he argues (Br. in Opp. 4) that the court of appeals' two-part test is a "useful and orderly means" of analyzing airport stops, and that the test is consistent with this Court's decisions. That dispute should be resolved after full briefing on the merits. At present, only a few points need be made.

Respondent apparently agrees with us (see Pet. 15-16) that a court must consider the totality of the circumstances in determining whether there was reasonable suspicion. He argues (Br. in Opp. 2), however, that the court of appeals' test allows all the facts to be considered, and that the court of appeals closely examined all the facts in this case. That argument does not fairly reflect what the court of appeals actually did. In its second amended opinion, the court of appeals refused to consider much of the evidence known to the narcotics officers—such as respondent's nervous $2100 cash purchase of open-return, round-trip airline tickets, and his 20-hour trip for the purpose of spending only two days in Miami, a major source of cocaine. See Pet. App. 20a. The court refused to consider those factors even though in its first opinion the court regarded the cash purchase by itself to be "close" to establishing reasonable suspicion. *Id.* at 42a.[2] The court of appeals held that such evidence is "irrelevant" (*id.* at 19a) unless an officer can

[2] Respondent also studiously ignores his cash purchase in arguing that there was no reasonable suspicion in this case.

show, through "[e]mpirical documentation," that "a pattern of behavior, otherwise explicable as innocent behavior, does not exist in a significant number of innocent people." *Id.* at 13a. The two-part test adopted by the court below therefore does not require a close examination of all the facts.

Respondent also apparently agrees with us (see Pet. 16, 20-22) that the evidence must be considered in light of the inferences that a trained and experienced officer would draw. In his view (Br. in Opp. 5), the " 'empirical documentation' " or " 'statistical evidence' " required by the court of appeals to substantiate many of the facts on which officers rely can be met by "the same type of evidence that this Court required in *Terry*, that is, evidence showing that the officer believed the conduct to be suspicious or criminal activity because of his experience or expertise in law enforcement and his own testimony 'about his trained observation of criminal activity.' " We do not share respondent's optimism. The court of appeals rejected the eminently reasonable judgment of officers with 25 years of law enforcement experience that respondent was using an alias. The court did so by relying on the supposition that "it is not uncommon for persons with different last names to share a common residence and telephone," and that it is not unusual for a person "to dictate prerecorded messages on the answering machine even though his or her name is not listed with the phone company as the subscriber." Pet. App. 18a. Similarly, the court of appeals gave no weight to the officers' judgment that respondent was nervous, because the court hypothesized that he may have been worried about a "mid-air collision" or "delays." *Id.* at 20a (citing *Newsweek*, July 27, 1987, at 20). The decision below therefore offers little basis for confidence that an officer's experience will

count for much under the court of appeals' new two-part reasonable suspicion test.

We completely part company with respondent on the degree of certitude that an officer must have that criminal activity is afoot before he may stop a suspect for questioning. Respondent agrees with the court of appeals (Br. in Opp. 4; Pet. App. 12a) that the facts known to the officers did not establish reasonable suspicion because each fact could also describe a significant number of innocent travelers. But this Court's decisions show that it is incorrect to disregard evidence that is equally consistent with innocent and illegal conduct when determining if reasonable suspicion exists. See Pet. 15 & n.16. In fact, the probable cause standard for an arrest does not require that it be more likely than not that a person has committed a crime; only a "fair probability" of criminality is necessary. *Illinois* v. *Gates*, 462 U.S. 213, 235, 238, 243-244 n.13 (1983).[3] Because the quantum of suspicion required for a *Terry* stop is less than probable cause, it follows that the evidence supporting reasonable suspicion need not establish the commission of a crime even half the time.[4] More importantly, when *all* the facts in this case are con-

[3] Even the reasonable doubt standard applicable at trial does not require a court to find that the proof is inconsistent with some conceivable hypothesis of innocence. *Jackson* v. *Virginia*, 443 U.S. 307, 317 n.9, 326 (1979); *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954).

[4] The courts of appeals have recognized that it is the rare case in which an officer observes behavior consistent only with guilt and incapable of an innocent interpretation. *United States* v. *Poitier*, 818 F.2d 679, 683 n.2 (8th Cir. 1987); *United States* v. *Rickus*, 737 F.2d 360, 365 (3d Cir. 1984); *United States* v. *Black*, 675 F.2d 129, 137 (7th Cir. 1982), cert. denied, 460 U.S. 1068 (1983); *United States* v. *Viegas*, 639 F.2d 42, 45 (1st Cir.), cert. denied, 451 U.S. 970 (1981); *United States* v. *Price*, 599 F.2d 494, 502 (2d Cir. 1979).

sidered together, it is highly unlikely that they would describe an innocent traveler.

Finally, respondent is mistaken in contending (Br. in Opp. 3-4, 9) that the court of appeals' ruling is consistent with *Reid* v. *Georgia*, 448 U.S. 438 (1980). In *Reid*, when the narcotics officers stopped the defendant, they knew that (1) he and a companion had arrived in Atlanta from Fort Lauderdale, a source city for cocaine; (2) they arrived early in the morning, when law enforcement activity is light; (3) both persons carried only shoulder bags; and (4) the defendant and his companion appeared to be trying to conceal the fact that they were traveling together. The Court held that the first three facts were insufficient since they "describe a vary large category of presumably innocent travelers" (*id.* at 441). The Court also found that the last fact was insufficient on the facts of that case to support reasonable suspicion. The Court did not hold that facts describing innocent travelers are never relevant to the reasonable suspicion determination. On the contrary, the Court expressly recognized that "there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot." *Ibid.* The Court simply conc' ded that "this is not such a case." *Ibid. Reid* therefore does not support the court of appeals' conclusion that before an officer may make a *Terry* stop he must prove that the facts known to him do not also fit the description of an innocent traveler.

CONCLUSION

The petition for a writ of certiorari should be held until the court of appeals has finally disposed of the government's supplemental petition for rehearing. If the supplemental petition for rehearing is denied, the petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

APRIL 1988

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-1021
D.C. No. CR 84-002200-02-SPK

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANDREW SOKOLOW, DEFENDANT-APPELLANT

[Filed Dec. 30, 1987]

ORDER

Before: FERGUSON, NORRIS and WIGGINS, Circuit Judges.

The clerk is directed to file the supplemental petition for rehearing with suggestion for rehearing en banc which was received November 18, 1987.

The petition when filed shall be deemed a new petition for rehearing with suggestion for rehearing en banc.

The clerk is directed to forward copies of the petition to all active judges of this Circuit.

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